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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 386

IN THE MATTER

of

HULON CAPSHAW, an Attorney,

Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITION FOR RE-HEARING

THOMAS I. SHERIDAN,
11 E. 44th Street,
New York, N. Y.,

DEAN ALFANGE,
9 E. 40th Street,
New York, N. Y.,

Attorneys for Petitioner.

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Hulon Capshaw, pursuant to Rule 33 of the Rules of this Honorable Court and the order herein enlarging the time under such rule to and including November 24, 1944, respectfully submits this, his petition, for re-hearing of the order denying a writ of certiorari in the above entitled matter.

Preliminary Statement

This petition for re-hearing is filed not merely as a matter of right (*R. Simpson & Co.* v. *Commissioner*, 321 U. S. 225, 229), but in the earnest hope of showing this Court that an injustice has been done the petitioner which this Court has jurisdiction to review and should review as a federal

question of substance not heretofore expressly determined by this Court, to the end that matters of importance affecting broader interests even than those of petitioner, important as they are to him, may be considered and decided.

In the following pages, petitioner, in amplification of his brief and reply brief on certiorari, refers briefly to the question of jurisdiction; the question of the denial to petitioner in the State courts of due process of law and the equal protection of the laws by the order disbarring petitioner on the suspicions engendered by the false testimony of confessed felons not in the record and given in a case to which petitioner was not a party; and the question of the lack of any real evidence to convict petitioner of wrong-doing in his decisions even if erroneous in two cases decided by him as a magistrate and in his testimony with respect thereto.

Jurisdiction

So far as known to petitioner, this Court has never expressly or directly decided the important question whether the right to practice law in a State court is a right of liberty and property which once accorded may not be taken away without due process of law or without according the right of the equal protection of the laws.

It is respectfully submitted, however, that in any case where it should appear that an attorney at law had been disbarred in a State court arbitrarily or on prejudice induced by public clamor or on testimony *dehors* the record in a case to which the attorney was not a party and in which he had no right of cross-examination, the disbarment would not be in accordance with due process or the equal protection of the laws, and if seasonably challenged would be subject to review in this Court. This principle appears inferentially or by *dictum* in many important cases decided by this Court. As said by this Court in *Ex Parte Garland*, 4 Wall. 333, 379: "The attorney and counsellor, being by the solemn judicial act of the Court, clothed with his office, does not hold it as a

matter of grace and favor * * *. It is a right of which he can only be deprived by the judgment of the Court for moral or professional delinquency". As said further by this Court in *Dent* v. *West Virginia*, 129 U. S. 114, 121-122: "Here, all vocations are open to every one on like conditions. All may be pursued as sources of livelihood, some requiring years of study and great learning for their successful prosecution. The interest, or as it is sometimes termed, the estate acquired in them, that is, the right to continue their prosecution, is often of great value to the possessors and cannot be arbitrarily taken from them, any more than their real or personal property can be thus taken". Still further, this Court, in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, in speaking of the Fourteenth Amendment of the Federal Statute, declared that the liberty mentioned in that amendment embraces the right of the citizen "to earn his livelihood by any lawful calling; to pursue any livelihood or avocation * * *". In various other instances, this Court has held or stated that the Fourteenth Amendment protects the right to pursue any lawful occupation or profession, and that any arbitrary denial of such right is a deprivation of liberty and property without due process of law within the meaning of such amendment (*Mayflower Farms* v. *Ten Eyck*, 297 U. S. 266; *New State Ice Co.* v. *Liebman*, 285 U. S. 262, 278; *Truax* v. *Raich*, 239 U. S. 33, 41; *Smith* v. *Texas*, 233 U. S. 630; *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Butchers Union Co.* v. *Crescent City Co.*, 111 U. S. 746).

Respondent, in its brief in opposition to certiorari, argued in its Point I to the effect that the right to practice law in a State court is merely a privilege which may be withdrawn by the State authorities for any reason whatsoever and that the decisions of the State authorities and the reasons therefor, however tenuous, cannot be made the subject of review in this Court. The cases cited by respondent do not sustain its position in this respect.

Ex parte Wall, 107 U. S. 265, was the case of a disbarment by a Federal court on charges of which the attorney

had clear notice and which were clearly proved—to the effect that the attorney had participated in an infamous crime just outside the door of the Court. Even in such a case, this Court, at page 289, took occasion to concede "that an attorney's calling or profession is his property, within the true sense and meaning of the Constitution."

Matter of Selling v. *Radford*, 243 U. S. 46, was the case of an original petition in this Court to disbar. Naturally, in such an original proceeding, this Court said, in effect, as quoted on page 10 of respondent's brief, that it had no authority to re-examine or reverse as a reviewing court the prior disbarment of the attorney in the Supreme Court of Michigan.

Ex parte Secombe, 19 How. 9, decided merely that a disbarment for offenses committed in open court could not be reviewed by the remedy of mandamus. Even in so holding, Chief Justice Taney pointed out, at page 13, that the power to disbar "is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility".

The quotation by respondent, at page 10 of its brief, from *In re Thatcher*, 190 Fed. 969, is inadequate to show the views of the Court in that case. At page 975 of the report of the case, the Court said: "Once admitted, the right to maintain his professional position against anything less than a judgment of exclusion, arrived at after a formal hearing upon notice and in the exercise of a sound and judicial discretion, likewise abides with an attorney at law. This is the tenor of all the authorities". And at page 976, the Court in the *Thatcher* case further said: "* * * and in deciding it we act upon the principle that the action is so analogous to a criminal prosecution that strict proof of professional misconduct only is available to remove him".

The cases of *Bradwell* v. *State of Illinois*, 16 Wall. 130, and *In re Lockwood*, 154 U. S. 116, held merely, in effect, that the right to practice law in a State court is not a privilege or immunity of citizens of the United States. They had

nothing to do with any question of due process or of the equal protection of the laws.

Denial to Petitioner of Rights of Due Process and Equal Protection of the Laws

As stated in petitioner's brief on certiorari (pp. 10-11), two witnesses for the People in the *Hines* case, J. Richard Davis and George Weinberg, both confessed felons, had testified to the effect that petitioner had conspired with Hines to dismiss the Klein and Silverstein policy cases in the Magistrate's Court. Petitioner was not a party to the *Hines* case, but only a witness therein, and has had no right or opportunity to cross-examine the witnesses mentioned.

At the hearing before the Referee, to whom the Appellate Division had referred the charges against petitioner in the disbarment proceedings for hearing and report, the Weinberg testimony, given in the *Hines* case, was offered in evidence by the Bar Association but over objection was in form excluded (R. 73-74). The exclusion amounted to little, however, since Weinberg's testimony was not only referred to in the Referee's report to the Appellate Division (R. 688) but was read in full into the record in the course of the petitioner's testimony in the Hines trial (R. 167-169). The exclusion naturally misled petitioner into the position of understanding that such testimony would not be considered as a factual basis for the disbarment and that it was consequently unnecessary to rebut the same by evidence. Such testimony, however, was obviously relied on by the Appellate Division as the basis for the disbarment of petitioner, as shown hereunder.

Of the three Justices out of five in the Appellate Division voting for disbarment, one based his vote solely on the prior removal of petitioner as Magistrate and the majority opinion thereon as reported in 258 App. Div. 470 (R. 692). His decision violated the well-settled law of New York to the effect that no other proceeding may be *res judicata* or have

any probative force or evidentiary value in a disbarment proceeding, and without changing that law as to like litigants under like circumstances, was a discrimination against petitioner and consequently a denial of the equal protection of the laws under the Federal Constitution. *Matter of Tanz*, 233 App. Div. 300, 1st Dept.; *Matter of Lynch*, 227 App. Div. 477, 1st Dept.; *Matter of Kaufman*, 245 N. Y. 423, 428; *Matter of Eldridge*, 82 N. Y. 161, 166; *Matter of Long*, 287 N. Y. 449, 454. Evidencing that those who voted for disbarment had violated the rule, the Justice dissenting from the disbarment stated:

> "I think the removal proceeding is not determinative but the evidence in this disbarment proceeding must be considered" (R. 693).

The other two Justices voting for disbarment, in their *per curiam* opinion also violated the rule in frankly stating (R. 692) that "The facts involved are stated in detail in the opinion of this Court in *Matter of Capshaw* (258 App. Div. 470)". Turning then to the opinion of the Court in 258 App. Div. 470, the Appellate Division finds as proven facts, as pointed out in petitioner's certiorari brief (pp. 6-7) that petitioner "aided" and was "implicated" as one of the "so-called benefactors" of the Hines-Dutch Schultz policy conspirators and racketeers; that the political leader Hines could "dominate" and "control" petitioner's decisions as a magistrate and "have cases disposed of favorably" in his court; that "the power of Hines was invoked" and "again called into action" in petitioner's decisions in the two policy cases, and "the circumstances disclosed" under which the two cases had come before him; that when the petitioner took the witness stand in the *Hines* case "he did so with full knowledge of the fact that several of the principals * * * had made complete confessions and had divulged the minute details of the numbers racket as operated by Dutch Schultz" and that petitioner attempted to "bring about the acquittal of Hines" and to "establish the innocence of Hines".

There was no possible basis anywhere in the record for these statements of alleged facts, unless it be in the testimony of Davis and Weinberg in form at least excluded from the record in the disbarment proceedings.

It clearly appears, therefore, the petitioner respectfully submits, that petitioner has been disbarred on testimony which he has never been able or had an opportunity to meet by cross-examination or proof. Under these circumstances, his disbarment was a denial of due process and of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Federal Constitution (See cases cited in petitioner's brief on certiorari, pages 19-23).

Lack of Any Real Evidence to Convict Petitioner of Wrong-Doing

The charges served on petitioner were that he erroneously and from unworthy and illegal motives dismissed two cases, the Klein and Silverstein cases, while sitting as a Magistrate, and that in defending his decisions by his testimony in the Hines trial he attempted to obstruct the administration of justice by deceiving and misleading the jury as to his real motives in deciding the two cases mentioned.

Petitioner has always contended that the two cases were decided solely because of his belief, on the law and practice as then understood in the Magistrate's Court, that the credible evidence in each of the two cases was insufficient to hold the persons under arrest. This belief was fortified by the advice of his own counsel and is sustained by the uncontradicted testimony herein (R. 683, 21-22). Whether his judicial discretion was soundly exercised was not the question. Whether his reasoning in upholding his views of the correctness of his decisions by his testimony in the Hines trial was sound, was also not the question. The sole question here was whether the petitioner was actuated by unworthy and illegal motives in dismissing the two cases and in testifying in the *Hines* case.

It is respectfully submitted that without the suspicions engendered by the Davis and Weinberg testimony in the *Hines* case, in form excluded from the record in the disbarment proceedings, it is impossible to find, from the records of the two cases decided by the petitioner or from his testimony in the Hines trial, any evidence of wrong-doing or of unworthy or illegal motives. The very fact that the Appellate Division invokes as facts charges which could be deduced only from the Davis and Weinberg testimony indicates that the Court, without such testimony, was not able to find grounds for the extreme penalty of disbarment.

Conclusion

In the interest of justice, not only to the petitioner, whose reputation has only been impunged by the self-serving testimony of the two felons, but to members of the bar and of the judiciary in general, the question of the rights of attorneys at law to the protection of the Fourteenth Amendment of the Federal Constitution should be clarified.

WHEREFORE, petitioner prays that the order of denial of the right of certiorari be recalled and that such writ issue as heretofore prayed.

Dated, New York, November 21, 1944.

Respectfully submitted,

THOMAS I. SHERIDAN,
DEAN ALFANGE,
Attorneys for Petitioner.

WE CERTIFY that this petition for re-hearing is presented in good faith and not for delay.

THOMAS I. SHERIDAN,
DEAN ALFANGE,
Attorneys for Petitioner.

End.